SUPREME COURT, U. S.

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United States Court of Appeals

October Term, 1957

No. 877

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

against

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

and against

EL DORADO OIL WORKS,

Respondent-Impleaded.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Statement

The libellant-respondent's brief in opposition is noteworthy for its avoidance of the principal issues raised in the petition. Counsel for libellant-respondent would have us believe that the Wrongful Death Act of New Jersey,

N. J. S. A. 2A:31-1 *et seq.* is a survival statute which preserved to the libellant-respondent all the rights which the deceased would have had had he been injured only. Counsel thus tries to circumvent the accepted principle that neither the general maritime law nor the common law have ever provided recoveries for wrongful death.

Statement of Facts

The lengthy Statement of Facts supplied by counsel for libellant-respondent, once stripped of details and minutia irrelevant at this stage of the suit, does not alter the presentation of facts set forth in the petition. No amount of sifting of the extensive testimony in this suit can alter the fact that this deceased met his death aboard m/v Tungus as a result of slipping on an oil spill, which was in turn the result of a failure of his employer's pump, for the maintenance of which deceased was himself responsible. Nor can it be denied that the deceased had been summoned by his employer to come aboard m/v Tungus in order to repair the very pump which had caused the oil spill.

Summary of Argument

The majority opinion of the United States Court of Appeals for the Third Circuit states that the libellant-respondent can assert a right to recovery based upon the unseaworthiness of the vessel aboard which the deceased was killed under the Wrongful Death Act of New Jersey.

Such a right to recover for unseaworthiness would have to arise from one or all of three possible sources. It might arise directly from the federal maritime law, or directly from the New Jersey Wrongful Death Act or by survival of the rights which the deceased himself would have had if he had been injured only rather than killed.

As to the first, even counsel for libelant-respondent does not urge that the federal maritime law provides any right to recover in cases of death occurring, either on the high seas or in waters of a state. There is no question but that the federal maritime law, like the common law, makes no provision for death. That point was covered in the petition, and was conceded by the Court of Appeals majority.

As to the second possible source (that the right to recover for unseaworthiness stems from the New Jersey Wrongful Death Act), we pointed out in the petition that such an interpretation of the Act is wholly unsupported by the language of the statute, its legislative history or its interpretation by the Courts of the State of New Jersey.

Finally, since it is now urged that the libelant-respondent's right to recover for unseaworthiness stems from a survival of the rights her deceased husband would have had against the vessel if he had been injured only, we must refer to the decisions of the Courts of the State of New Jersey which hold that the New Jersey Wrongful Death Act is *not* a survival statute, but creates an entirely new cause of action. New Jersey has a separate survival statute, in which, however, damages are limited to conscious pain and suffering of the deceased, medical expenses in connection with his illness, if any, and similar matters, as to all of which there was no proof of damages in the instant suit.

The decision of the United States Court of Appeals for the Third Circuit cannot be justified under any of the foregoing theories.

ARGUMENT

The wrongful death act of New Jersey is not a survival statute.

Libelant-respondent argues in her brief that the Wrongful Death Act of New Jersey preserved to her causes of action under the general maritime law which her deceased husband would have had had he been injured only. In this manner she attempts to explain her right to recover for unseaworthiness, while having to admit at the same time that the general maritime law makes no provision for death.

As correctly stated on page 2 of her brief, libelant-respondent filed a libel stating four causes of action, two under the Wrongful Death Act of New Jersey, and two setting forth survival counts for pain and suffering of the deceased himself. The trial record, however, was bare of any testimony having to do with conscious pain and suffering or as to any time period between the fall and the moment of death. No damages were proven which might be recoverable under the provisions of the New Jersey Survival Statute (Revised Statutes of New Jersey 2A:15-2; N. J. S. A. 2A:15-2). Perhaps disappointed by the failure to prove damages under the survival counts, libelant-respondent now would have this Court believe that the Wrongful Death Act was a survival statute as well. The Courts of New Jersey have held otherwise.

In *Turon* v. *J. & L. Construction Company*, 8 N. J. 543, 556, 86 A. 2d 192 (Supreme Court New Jersey 1952), the Court wrote as follows in interpreting the New Jersey Wrongful Death Act:

> "This is not a mere survival statute. *It does not abolish the rule that a personal action dies with a person injured. The act creates new causes of action* for the loss suffered by the beneficiaries, measured by the reasonable expectation of pecuniary advan-

tage from the continuance of the life of the deceased. • • •

"As said, *it is in no sense the enforcement of an action by survival.*" (Emphasis supplied.)

The New Jersey Court gave no effect to the "such as would" language. This interpretation stemmed from that part of the Act defining the scope of the damages (N. J. S. A. 2A:31-5):

> "In every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries *resulting from such death* to the persons entitled to and to any intestate personal property of the decedent." (Emphasis supplied.)

Similar interpretations of the "such as would" language have been made by the British Courts (interpreting Lord Campbell's Act, where the phraseology originated) in *Blake* v. *Midland Railway Company*, 18 Q.B. 93, 110, 29 L.J.Q.B. 233, 16 Jur. 562 (1852) and in *Seward* v. *Vera Cruz*, 10 App. Cas. 59 (House of Lords, 1884). To the same effect are the interpretations of the Florida Wrongful Death Act by the Fifth Circuit in *Graham* v. *A. Lusi Ltd.*, 206 F. 2d 223 (C. A. 5, 1953) and of the Tennessee Death Statute by the Sixth Circuit in *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (C. A. 6, 1955).

In a case involving death occurring in state waters the rights of the estate of the deceased under the state wrongful death act and under the state survival statute may be quite different. Such a distinction is to be found in *Curtis* v. *A. Garcia Y Cia.*, 241 F. 2d 30 (C. A. 3, 1957). Appeals 11,993 and 11,994 in that case concerned two claims by the administratrix of Thomas' estate based upon the Pennsylvania Wrongful Death Act and the Pennsylvania Survival Statute. As stated in the opinion, the Courts of Pennsylvania had held that the Pennsylvania Wrongful Death Act

did not carry over causes of action which the deceased might have had had he survived. The ruling of the Pennsylvania Courts on this question is identical to those to be found in the State of New Jersey. The *Curtis* decision is of prime interest because the contributory negligence of the deceased, Thomas, was held to be a bar to a recovery by his estate under the wrongful death statute, but his contributory negligence went only to mitigation of damages in the causes of action based on the survival statute, since the survival statute preserved the deceased's right of action under the federal maritime law. In denying recovery under the Wrongful Death Act the Court wrote as follows at 241 F. 2d 36;

> "The test is whether the right is one rooted in the general maritime law or one rooted in the state law. When the origin of the right has been determined, the court, federal or state, must apply the law of that jurisdiction in which that right originated. This plaintiff, in seeking recovery under the wrongful death statute, undertakes the enforcement of a right which is neither rooted in nor recognized by the maritime or the common law, but is wholly state created."

Libelant-respondent argues on page 18 of her brief that "an absurd situation would arise" if, in a case involving death in state waters, the cause of action under the State survival statute would be determined by federal maritime law, whereas the cause of action under the wrongful death act of that state would be governed by state law. To so argue is to say that the decision in *Curtis* v. *A. Garcia Y Cia., supra*, is absurd, for that is just what the Court held. We submit that that decision is sound and logical and whatever anomaly there may be stems from the irrefutable proposition that neither the common law nor the federal maritime law have ever provided recoveries for death.

A further example of the acceptance of the anomaly is to be found in *Byrd* v. *Napoleon Avenue Ferry Co.*, 125 F. Supp. 573 (E. D. La., 1954), affirmed on opinion below

227 F. 2d 958 (C. A. 5, 1955) cert. den. 351 U. S. 925, 76 S. Ct. 783, 100 L. Ed. 601 (1956). In that case the District Court held that the contributory negligence of the deceased husband, who was killed on the navigable waters of a state, barred a recovery for his death, whereas any contributory negligence of his wife, who was injured only, would have gone only to the mitigation of her damages.

An interesting comment on the *Burd* decision was made by Dean Roscoe Pound, Editor in Chief of the Law Journal published by the National Association of Claimant's Compensation Attorneys, at 15 NACCA L. J. 260, where he wrote:

> "In the instant case there is the anomaly that if the husband had lived his action would not have been barred by his contributory negligence, but, as he was killed, it was so barred. On the other hand, there would be a no less anomalous and a very inconvenient situation if the general maritime law as to negligence were applied to a suit in admiralty under the state Death Act. A different law in suits for wrongful death under the state act in the federal court to that applicable to the same suit in the state court would bring back into our law the bad condition from which we have been delivered as to suits in the diversity jurisdiction by Erie R. Co. v. Tompkins, 304 U. S. 84 (1938). But as in the instant case the only action for death of the husband was under the state law and under the state statute his contributory negligence barred his suit, the contributory negligence of the widow, if there had been any, would not bar her suit for personal injuries under the general maritime law. * * *.
>
> "Anomalies of this sort in a legal system are beyond the reach of judicial shaping of the law and the Legislature is not interested in them."

Judicial recognition of the anomaly is found in *Just* v. *Chambers*, 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941), in which it was held that Florida law could give a cause of action to an injured person against a deceased

shipowner even though the Federal law made no provision for such survivorship. Mr. Chief Justice Hughes wrote as follows at page 392:

> "For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. *Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved.*" (Emphasis supplied.)

Libelant-respondent's disappointment at not being able to prove damages on the survival counts of the libel, cannot justify interpreting the New Jersey Wrongful Death Act as a survival statute so as to give her a right to recover for unseaworthiness under the federal maritime law, which, being a right the deceased might have had had he survived, was not preserved to his widow by that legislation. There is no requirement under our law that rights in cases of death and injury must be identical or coextensive.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Respectfully submitted,

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